STATE OF MICHIGAN

COURT OF APPEALS

LOUISE EGESTON,

Plaintiff-Appellant,

v

KERN HOSPITAL,

Defendant,

and

SOUTHEAST MICHIGAN SURGICAL HOSPITAL LLC,

Defendant-Appellant.

UNPUBLISHED
November 17, 2005

No. 262498
Macomb Circuit Court
LC No. 2004-001821-CK

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Plaintiff Louise Egeston appeals as of right from a circuit court order granting summary disposition in favor of defendant Southeast Michigan Surgical Hospital LLC (SMSH).[1] We affirm.

I

On November 16, 2001, plaintiff was discharged by Kern Hospital. On April 11, 2002, plaintiff filed a wrongful discharge claim with the Michigan Department of Civil Rights (MDCR) and the Equal Employment Opportunity Commission (EEOC), in which she alleged that she was discharged because of her age and race in violation of the Elliott-Larsen Michigan Civil Rights Act (MCRA) and Title VII. On January 13, 2003, plaintiff and Kern Hospital entered into a settlement agreement, which provided: (1) Kern Hospital was not admitting any civil rights violations, (2) plaintiff would not sue if the agreement was complied with, (3) claims

[1] A default judgment was previously entered against Kern Hospital for failure to plead or otherwise defend. Kern Hospital is not appealing this judgment.

would be withdrawn, (3) Kern Hospital would pay plaintiff $12,000 in four payments of $3,000, and (4) plaintiff's medical coverage would continue through January 31, 2004.

Kern Hospital apparently did not comply with the settlement agreement. On October 13, 2003, SMSH purchased certain assets associated with Kern Hospital from Dequindre Corporation pursuant to an Asset Purchase Agreement (APA). At the time of this agreement, Kern Hospital was owned and operated by Dequindre Corporation.

On April 29, 2004, plaintiff filed a complaint in which she alleged: (1) plaintiff and Kern Hospital entered into a settlement agreement through the MDCR; (2) Kern Hospital did not make payments in compliance with the agreement, thus, breached the contract; and (3) this breach damaged plaintiff's credit rating because she could not pay bills. SMSH filed an answer with affirmative defenses in which it asserted that plaintiff failed to state a claim, did not give adequate notice, SMSH is not a party and is unrelated to Kern Hospital, SMSH did not assume obligations to any agreement between plaintiff and Kern Hospital, SMSH is not a successor, and that SMSH was indemnified by Dequindre Corporation and Louis Cole.[2] Plaintiff admitted that: (1) SMSH was not a party to the agreement, (2) she performed no services for SMSH, (3) SMSH never promised any compensation, and (4) Dequindre Corporation d/b/a Kern Hospital, not SMSH, discharged her.

Subsequently, plaintiff filed a proposed first amended complaint, and alleged Kern Hospital breached the settlement agreement and that SMSH became liable when it purchased Kern Hospital's assets. SMSH filed a response, and contended the motion to amend should be denied for purposes of judicial economy and because it would be futile. The trial court entered an order allowing the first amended complaint.

SMSH filed a motion for summary disposition, and contended that it was not liable to plaintiff because plaintiff contracted with Kern Hospital and not SMSH. SMSH further contended that it was not liable because it did not assume or become successor to the settlement agreement obligations of Kern Hospital. Specifically, SMSH contended it was not a successor in liability because: (1) non common ownership between SMSH and Dequindre Corporation, (2) Dequindre Corporation still exists and has assets, (3) SMSH and Dequindre Corporation have virtually none of the same officers, (4) SMSH immediately changed signage on the property, (5) SMSH immediately gave notice to vendors that Dequindre Corporation was responsible for liabilities prior to the APA, and (6) all secured creditors of Dequindre Corporation were paid. SMSH also argued that: (1) it expressly disclaimed all but certain enumerated liabilities; (2) plaintiff has not alleged a de facto merger, fraudulent transfer, or bad faith transaction; (3) plaintiff has not and cannot allege that SMSH is a mere continuation of Kern Hospital; and (4) plaintiff has not and cannot allege that good faith is lacking, the transfer from Kern Hospital to SMSH was without consideration, or the creditors of Kern Hospital were not provided for. Plaintiff filed an answer to the motion for summary disposition, counter motioned for summary disposition, and contended that under the agreement SMSH is liable standing in Kern Hospital's

[2] At the time of the execution of the APA, Cole owned all outstanding capital stock of Dequindre Corporation.

"shoes." In addition, plaintiff asserted that SMSH was obligated as plaintiff was an intended third party beneficiary of the asset sale.

SMSH filed a response brief in opposition to plaintiff's motion for summary disposition and a reply brief in support of its own motion, and contended the APA expressly excluded liability for this type claim, (2) plaintiff was not a third party beneficiary of the APA between SMSH and Dequindre Corporation, (3) the existence of an indemnity agreement and a lease agreement do not entitle plaintiff to a claim against SMSH, and (4) plaintiff has presented no evidence creating a genuine issue of material fact that would defeat SMSH's motion for summary disposition.

On February 7, 2005, the trial court entered an opinion and order granting SMSH's motion for summary disposition. Specifically, the trial court provided the following reasons for its decision: (1) the "overt absence of relevant and applicable authority in plaintiff's counter motion," (2) plaintiff states that she had not made claims of successor liability even though it seems to be a veiled attempt to, (3) the connection between plaintiff's settlement agreement with Kern Hospital and the APA is too tenuous to support imposition of liability, and (4) the remainder of the arguments are lacking in sufficient substance and weight to overcome her burden.

Subsequently, plaintiff filed a motion for reconsideration, relief from judgment, and in the alternative to amend the pleadings to add successor liability counts. The trial court entered an opinion and order denying plaintiff's motions, finding no basis. Thereafter, plaintiff filed a motion for the court to reconsider its previous order, and contended that the trial court overlooked the reach of antidiscrimination laws. Again, the trial court entered an opinion and order denying this motion.

II

On appeal, plaintiff argues that the doctrine of successor liability applies because of equity in the context of civil rights violations premised on age and race discrimination, equitable estoppel, and breach of implied contract to indemnify third party plaintiff. We disagree.

A. Standard of Review

This Court reviews de novo the grant or denial of summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). However, the issues raised by plaintiff are regarding the trial court's denial of her attempts to amend her complaint. During a hearing on defendant's motion for summary disposition, plaintiff stated that it was not making a claim of successor liability. After summary disposition was entered in favor of defendant, plaintiff for the first time raised claims in a motion for reconsideration, relief from judgment or in the alternative to amend the pleadings, regarding successor liability for civil rights violations, equitable estoppel, and breach of implied contact to indemnify third party plaintiff. This Court will not reverse a trial court's decision on a motion to amend a complaint absent an abuse of discretion that results in injustice. *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995).

MCR 2.118(A)(2) states: "Except as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." Further, our Supreme Court has provided that:

> A motion to amend ordinarily should be granted, and denied only for particularized reasons:
>
> "In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be 'freely given.'" [*Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973), quoting *Foman v Davis*, 371 US 178, 182; 83 S Ct 227; 9 L Ed 2d 222 (1962).]

"On a motion to amend, a court should ignore the substantive merits of a claim or defense unless it is legally insufficient on its face and, thus, . . . it would be 'futile' to allow the amendment." *Fyke*, *supra* at 660. Where a plaintiff merely restates or slightly elaborates on counts or allegations already pleaded, an amendment is futile. *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 76; 592 NW2d 724 (1998). We must address the merits to determine if the motion would have been futile.

B. Successor Liability for a Civil Rights Claim

> The assumed liabilities section of the APA, Section 2.2, provides:
>
> Purchaser agrees to and will at the Closing assume and pay when lawfully due up to $2,850,000 of Seller's liabilities, as identified by Seller on Schedule 2.2 (said liabilities are referred to herein as the "Assumed Liabilities"). Assumed liabilities shall not include the Excluded liabilities, as hereinafter defined, specifically excluded by section 2.3 hereof. In the event the Assumed Liabilities of Purchaser are less than $2,850,000 at the Closing, Purchaser agrees to pay in cash to the Seller the difference between $2,850,000 and the actual Assumed Liabilities.

It is not disputed that plaintiff's claim is not included in the Schedule 2.2 assumed liabilities. The excluded liabilities section of the APA provides in part:

> Other than the assumed liabilities, Seller hereby agrees that Purchaser is not assuming, and shall have no responsibility or obligation whatsoever for, any liability or obligation of Seller ("Excluded Liabilities"), including but not limited to the following . . .

The agreement goes on to provide specific liabilities that are excluded.

"Generally, where one corporation sells its assets to another, the purchaser is not responsible for the debts and liabilities of the seller." *Shue & Voeks, Inc v Amenity Design & Mfg, Inc*, 203 Mich App 124, 127-128; 511 NW2d 700 (1993), citing *Stevens v McLouth Steel Products Corp*, 433 Mich 365; 446 NW2d 95 (1989). However, in *Stevens*, *supra* at 375, our

Supreme Court adopted a stricter standard for reviewing successor liability claims for employment discrimination. The *Stevens* Court adopted the balancing test provided in *EEOC v Macmillan Bloedel Containers, Inc,* 503 F2d 1086 (CA 6, 1974), as it was limited by *Wiggins v Spector Freight System, Inc*, 583 F2d 882 (CA 6, 1978) and *Rabidue v Osceola Refining Co*, 805 F2d 611 (CA 6, 1986).

Specifically, the *Stevens* Court adopted the following balancing test, from *Macmillan*, to evaluate successor liability for a civil rights charge:

> "1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product." [*Stevens, supra* at 372, quoting *Macmillan, supra* at 1094.]

And, adopted the following limitation enunciated in *Wiggins* and reaffirmed in *Rabidue*:

> successor employer could not be held liable under federal discrimination laws if (1) charges were not filed with the EEOC at the time of the acquisition and (2) the successor corporation had no notice of any claims of discrimination at the time of the acquisition. The *Wiggins* court expressly held that where these two conditions exist, a case is "[removed] . . . from the rationale" of *MacMillan* and successor liability does not attach. *Wiggins, supra*, p 886. [*Stevens, supra* at 373.]

The Court added the following with regard to notice:

> "Notice" is a multifarious concept which, in basic terms, connotes knowledge or information. A person has notice of a fact when,
>
> "from all the information at his disposal, he has reason to know of it. That is, a person is deemed to have notice when he has actual knowledge or when from all the facts and circumstances known to him at the time in question, he has reason to know that it exists.
>
> As a general rule, a person has notice of a fact only when it is actually communicated to him in such a way that his mind can and does take cognizance of it. The essence of notice, when it is sufficient in form and content, is its objective effect on the person to whom it is given, not the subjective intent of the person who gives it. Thus, notice must be clear, definite, explicit, and unambiguous." [*Id*. at 377-378, quoting 58 Am Jur 2d, Notice, § 2, pp 572-573.]

In addition, the *Stevens* Court agreed with the *Rabidue* Court that this determination for successor liability extended to the MCRA. *Id*. at 374.

In the present case we find that the trial court did not abuse its discretion in denying plaintiff's motion to amend her complaint because it would have been futile for lack of notice. First of all, the charges had been withdrawn pursuant to the settlement agreement plaintiff entered into. Second, there is nothing in the record supporting notice and plaintiff's arguments for notice are contrary to record developed before the lower court. There is no dispute that plaintiff did not give SMSH notice until she filed her original complaint.

However, plaintiff, in her brief on appeal, contends that SMSH was on notice because of labor relations documentation and that it should have contacted the MDCR to find out if there were claims filed. However, the labor relations materials provided in the lower court file support that there was no notice. And, the settlement agreement provided that the claims be withdrawn. In section 4.18 of the APA regarding labor relations, seller affirmatively provided that to the best of its knowledge it had been in compliance with all applicable state and federal laws, including the MCRA. In addition, in section 4.18 of the APA, seller asserted that no current or former employee had ever filed or threatened to file with any governmental authority a claim based on age or racial discrimination. Because there was nothing supporting notice and plaintiff's arguments are contrary to the established record, successor liability would not attach, thus, the amended complaint would have been futile in this regard. We realize that this is just a motion to amend the complaint, but under these circumstances the trial court did not abuse its discretion in denying this motion. Particularly, when plaintiff's allegations are premised on allegations that are contrary to the established record.

C. Equitable Estoppel

Plaintiff next contends that the doctrine of successor liability applies in equity in the context of an estoppel premised on implied terms in the APA. As noted, *supra*, the obligations of the seller will be considered assumed by the purchaser of under certain limited circumstances. Those circumstances include situations where two or more corporations consolidate and form a new corporation making no provision for the payment of the old corporation's debts, where the purchasing corporation either expressly or impliedly agrees to assume the obligations, where the new corporation is a mere continuance of the old, or where the sale is fraudulent. *Antiphon, Inc v LEP Transport, Inc*, 183 Mich App 377, 382-383; 454 NW2d 222 (1990). In addition, in *Antiphon, supra* at 384, this Court held that:

> In the realm of corporate successor liability, a successor corporation may be held responsible for the liabilities incurred by its predecessor where the facts demonstrate that there existed an implied agreement to assume liability. [*Chase v Michigan Telephone Co*, 121 Mich 631, 634; 80 NW 717 (1899).] Although there is no precise rule governing the finding of implied liability, there is authority that suggests such a finding may be made where the conduct or representations relied upon by the party asserting liability indicate an intention on the part of the buyer to pay the debts of the seller. See *Ladjevardian v Laidlaw-Coggeshall, Inc*, 431 F Supp 835, 839 (SD NY, 1977); 15 Fletcher, Cyclopedia Corporations, § 7124, p 211. Whether such an intent exists must be determined from the facts and circumstances of each case. *Ladjevardian, supra*; Fletcher, *supra*. The factors to consider are: (1) the effect of the transfer on the creditors of the predecessor corporation; and (2) admissions of liability on the part of officers or other spokespersons of the successor corporation. *Ladjevardian, supra*; Fletcher, *supra*.

> We believe that the rationale underlying an application of the doctrine of estoppel and the implied agreement to assume liability exception are the same -- that rationale being that a party may not, by its conduct or silence, assume a position that if maintained would result in an injustice to another. Accordingly, we conclude that when the trial court found that Antiphon was estopped from denying successor liability it, in actuality, was deciding that Antiphon's conduct gave rise to an implied acceptance of liability and that LEP was reasonable in relying on this implied acceptance to its detriment.

Again, we do not believe that the trial court abused its discretion in denying plaintiff's motion to amend, as it would have been futile in this regard. There is no support for this being the same type of situation as in *Antiphon*. In *Antiphon*, there were activities prior to the transfer, which could lead those with claims to believe that the successor had assumed liability and this combined with silence could be relied on. Discovery was completed and there was no support for any suggestion that defendant through conduct induced plaintiff to believe any facts such that SMSH was assuming liability. Plaintiff is making contentions against Kern Hospital for its wrongful conduct, but has failed to present why SMSH induced her. There is nothing supporting an inducement by SMSH, for which plaintiff relied on. In addition, there is no support for the new corporation being a mere continuance of the old, and plaintiff acknowledged that SMSH was not a mere continuance of Kern Hospital or Dequindre Corporation. For these reasons, we find that the trial court did not abuse its discretion in denying plaintiff's motion to amend, in this regard, as it would have been futile.

D. Indemnification Provision Covering Non-contingent Third Party Liabilities

Lastly, plaintiff, citing *Safeco Ins Co v Pontiac Plastics & Supply Co*., unpublished opinion per curiam issued January 21, 2000 (Docket No. 214079),[3] argues that the indemnification provision was intended to explicitly or impliedly to provide for certain excluded non-contingent third party liabilities.

SMSH specifically assumed only the liabilities listed pursuant to 2.2 of the APA. There is no dispute that plaintiff's claim is not a listed liability in this regard. Under excluded liabilities, Section 2.3.9 of the APA provides that:

> Any liability, contract, commitment or other obligation of Cole or Seller, known or unknown, fixed or contingent, to the extent the existence of such liability, contract, commitment or other obligation constitutes or will constitute a breach of any representation or warranty of the seller contained in or made pursuant to Section 4 of this agreement.

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[3] We note that unpublished opinions are not binding under the rules of stare decisis. MCR 215(C)(1)

In Section 4, as previously noted Seller provided that it was in compliance with the CRA and that no claims had been made for age or race discrimination. Thus, it is clear these are excluded liabilities under Section 2.3.9 of the APA because they represent a breach of representations made by the seller pursuant to section 4.

Plaintiff points to section 4.5, which provides that seller's liabilities include "third-payor settlements incurred in the ordinary course of business." However, there cannot be an implied agreement here, as there is an express agreement stated above to the contrary. Because this settlement represents a settlement incurred for a age and race discrimination complaint, it comes under specifically excluded liabilities under Section 2.3.9 of the APA, as it would be considered a breach of a representation made pursuant to Section 4 of the APA. In addition, we do not believe this claim, which was pursuant to an agreement entered into ten months prior to the execution of the APA, was in the ordinary course of business.

III

Recognizing that we are not to look at the substantive merits of the claim, we emphasize that the trial court did not abuse its discretion in denying plaintiff's attempt to amend the complaint because she had ample opportunity prior to entry of summary disposition to amend the complaint. See *Smith v Westland*, 158 Mich App 132, 137; 404 NW2d 214 (1986). Plaintiff is attempting to amend her complaint to add the different successor liability claims. SMSH raised the possibility in an early pleading, and plaintiff responded her claim was not one of successor liability in her answer to SMSH's motion for summary disposition. The circuit court also raised issue with successor liability at the hearing for the motion for summary disposition and plaintiff again responded she was not proceeding under this theory. Then plaintiff not responding to the trial court's grant of summary disposition in time for a motion for reconsideration in compliance with MCR 2.119(F)(1), also filed a motion for relief from judgment and in the alternative to amend the complaint. Further, discovery has been completed and there is nothing to support the claims that plaintiff is attempting to add through amendment. The previous pleadings and documentation do not support any of plaintiff's claims. We find that the trial court did not abuse its discretion.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood